(1)

88-343

No. _____

Supreme Court, U.S.
FILED
AUG 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

PATRICK T. MURPHY,
guardian of Virginia Prange,

vs. *Petitioner,*

MARGARET BENSON,
guardian ad litem of Virginia Prange,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Illinois erred in vacating without explanation the decision of the Illinois Appellate Court that an elderly, incompetent person in a persistent vegetative state had a federal and state constitutional privacy right to have her judgment substituted by that of her guardian, who carried out her expressed written wishes to have all life sustaining medical procedures, including artificial feeding mechanisms, terminated, thus permitting her to die. The order of the Illinois Supreme Court leaves many Illinois citizens unable to terminate life support systems in conflict with other jurisdictions in which the courts have held such a right exists.

PARTIES

The parties in this case are the Petitioner, ESTATE OF VIRGINIA PRANGE, through her guardian PATRICK T. MURPHY Public Guardian of Cook County and the Respondent MARGARET BENSON of the Volunteer Legal Services Foundation.

The Petitioner herein was the Petitioner in the Circuit Court, the Appellant in the Illinois Appellate Court and Respondent in the Illinois Supreme Court.

The Respondent was appointed by the Illinois Appellate Court to present the opposing issue and was denied leave to withdraw as counsel by the Illinois Supreme Court.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provisions 1

Statement of the Case 2

Argument 7

THE FINAL ORDER OF THE ILLINOIS SUPREME COURT MERITS REVIEW BECAUSE, BY IMPLICATION, THE ORDER DEPRIVES ILLINOIS CITIZENS OF PRIVACY RIGHTS, RECOGNIZED AND ENFORCEABLE IN OTHER JURISDICTIONS, TO HAVE LIFE SUPPORT SYSTEMS TERMINATED WHEN ONE IS IN A PERSISTENT VEGETATIVE STATE. 7

APPENDICES:

A. Illinois Supreme Court ..... App. 1

B. Opinion of the Illinois Appellate Court ..... App. 3

C. Order to the Circuit Court ..... App. 20

D. Order Denying Rehearing ..... App. 21

TABLE OF AUTHORITIES

Page

CASES:

Bartling v. Superior Court, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220, 221, 225 (Cal. Ct. App. 2d 1984) 9

Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417, 430-33, 497 N.E.2d 626, 632-33 (1986) 9

In re Colyer, 99 Wash.2d 114, 120, 660 P.2d 738, 742 (1983), *overruled in part on other grounds* 9

In the Matter of Conroy, 98 N.J. 321, 348, 486 A.2d 1209 (1985) 9

Foody v. Manchester Memorial Hospital, 40 Conn. Supp. 127, 482 A.2d 713, 717 (Super Ct. 1984) 9

In re L.H.R., 253 Ga. 439, 446, 321 S.E. 2d 716, 722 (1984) 9

Leach v. Akron General Medical Center, 68 Ohio Misc. 1, 9, 426, N.E.2d 809, 813-14 (Com. Pl. 1980) 9

In re Quinlan, 70 N.J. 10, 40, 355 A.2d 647, 662-63, *cert. denied*, 429 U.S. 922 (1976), *overruled in part on other grounds: In re Conroy*, 98 N.J. 321, 348, 486 A.2d 1209, 1222-23 (1985) 9

Rasmussen v. Fleming, 154 Ariz. 200, 203 741, P.2d 674, 681 (Ariz. 1987) 9

Satz v. Perlmutter, 362 So.2d 160, 162 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So.2d 359 (Fla. 1980) 9

TABLE OF AUTHORITIES–Continued

Page

In re Severns, 425 A.2d 156, 158, 159 (Del. Ch. 1980) 9

In The Matter of Spring, 380 Mass. 629, 405 N.E.2d 115 (Mass. Supr. Ct. 1980) 9

Superintendent of Balchertown v. Saikewicz, 373 Mass. 728, 370 N.E. 2d 417 (1977) 9

In re Torres, 357 N.W.2d 332, 339 (Minn. 1984) 9

STATUTES:

United States Constitution, Amendments IV, V, IX, XIV 1, 2

Ill. Rev. Stat., Ch. 110 ½, Sec. 701-10 (1987) 8

Ill. Rev. Stat., Ch. 110 ½, Sec. 804-1 (1987) 8

OPINIONS BELOW

The order of the Illinois Supreme Court has not been published and is attached as appendix A. The opinion of the Illinois Appellate Court is published as 166 Ill.App. 3d 1091, 520 NE 2d 946, 117 Ill. Dec. 595, and is attached as appendix B. The decision of the Circuit Court is unpublished and attached as appendix C.

JURISDICTION

The order of Illinois Supreme Court was entered on May 19, 1988. A timely Petition for Rehearing was filed and denied on June 10, 1988. Jurisdiction to review the order of the Illinois Supreme Court is conferred upon this Court by 28 USC 1257 (3).

CONSTITUTIONAL PROVISIONS

U.S. Constitution, and Amendments thereto, Bill of Rights specifically:

AMENDMENT I:

Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV, SECTION 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE[1]

Virginia Prange was a 74 year old woman who had undergone seven surgeries over a several year period of

[1] The Statement of the Case is a summary of the Statement of Facts set forth in the Illinois Appellate Court Opinion between Pages Two and Six (Appendix B).

time to remove a persistent brain tumor. She had no immediate relatives and resided in a nursing home after her last surgery, in December, 1985. In January, 1986, she lapsed into what her attending physician characterized as a persistent vegetative state and was unable to interact with her environment and did not respond purposefully to stimuli. A nasal gastric tube was inserted in order to provide her with nutrition and hydration.

The Cook County Public Guardian was appointed her plenary guardian and on October 30, 1986, he filed a Petition Regarding Medical Consent. In the Petition the Guardian stated that he had refused consent for a surgical procedure and blood transfusions and asked that the Court ratify those decisions. The Petition further requested that the Court direct the Public Guardian to remove the nasal gastric tube, thereby discontinuing artificial means of providing nutrition and hydration to Virginia Prange. At the request of the guardian, a guardian ad litem was appointed to oppose the Petition.

At a hearing on the Petition the Court was presented with a written memorandum signed by Virginia Prange in which she stated (Appendix B, Page 3) that if a situation should arise in which there would be no reasonable expectation of her recovery from extreme physical or mental disability that "I direct that I be allowed to die and not be kept alive by medications, artificial means, or heroic measures. . . ."

Five close friends of Virginia Prange testified. Monsignor Joseph Howard testified that in 1985 Prange told him that she wanted no further operations and that she would rather die than have her life prolonged by artificial

or extraordinary means. Eleanor Jennings stated that Prange told her that she did not want to be kept alive by "tube feeding" and would rather "close her eyes and die." Prange's second cousin and closest relative, Barbara Knuth, testified that she had discussed the topic of death with Prange and that Prange told her that she did not want to live in a nursing home and that she wished to "die with dignity." Two other witnesses, Sister Mary Ann McSweeney and Therese Barlow, testified that based upon conversations with Prange it was their opinion that she would not want to be kept alive by artificial means of providing nutrition and hydration. Objections to this opinion testimony were sustained by the trial judge.

All but one of the physicians who testified at the hearing conceded that Virginia Prange was in a persistent vegetative state and had suffered irreversible neurological damage. Dr. Joseph Carr, Prange's attending physician since December 1985, testified that Prange was unresponsive to stimuli for the past six months and would never regain consciousness. He further stated that her deteriorating state would only worsen and that it was unlikely that she would feel pain if the artificial means of nourishment were removed. Dr. Michael Preodor, the medical director of a hospice, testified that he had examined Virginia Prange and had reviewed her medical records. It was his opinion that Prange had suffered permanent intellectual impairment and that even if her physical condition were to improve, she would not be able to be involved with her environment to any significant degree. Dr. Preodor stated that under these circumstances, he considered the continuation of tube feeding an extraordinary measure. He further stated that

although there was no evidence that Prange could feel pain, there was no way this could be conclusively determined.

Dr. Stephen Miles, an associate director at the Center for Clinical Medical Ethics at the University of Chicago, testified that he had examined Virginia Prange and had reviewed her medical records covering the period from November 1985 until the present. He concluded that she suffered from an irreversible and progressive condition with a permanent reduction of her intellectual function. Dr. Miles stated that Prange was terminally ill and that, in his opinion, she would not feel pain if nutrition and hydration were withdrawn. Dr. Quentin Young, a specialist in internal medicine, testified that Virginia Prange had sustained irreversible brain damage and would not recover from her neurological impairment.

The only physician who expressed disagreement with the above-stated opinions regarding Virginia Prange's prognosis was Dr. Leonard Kranzler, a neurosurgeon who had been called into consultation on Prange's case in December, 1975. Dr. Kranzler testified that he had performed several successful brain surgeries on Virginia Prange. He had not seen Prange between the time of the last surgery in December 1985 and October 1986. Dr. Kranzler stated that when he examined Prange in October 1986, she was suffering from several medical problems including septicemia and decubitus ulcers. He further stated that her persistent brain tumor had not increased very much since November 1985, and that if she were given proper nutrition, antibiotics, and electrolytes, she had the potential to improve, although he could not say to what degree. Dr. Kranzler admitted that he had

not reviewed the hospital or nursing home notes from the period covering December 1985 until October 1986. Therefore, he did not know whether the medical problems he observed had been corrected earlier with no effect upon her comatose condition.

Following the hearing and after oral argument, but before a decision was rendered, Virginia Prange died. The Court dismissed the matter as moot and the Public Guardian appealed. The Guardian ad Litem appointed at the trial court level had been dismissed and another one was appointed for the appeal. The Illinois Appellate Court (Appendix B) issued an opinion stating that the case was not moot because of the public interest exception to the Mootness Doctrine. (Appendix B, Pages 6-9) The Court went on the hold that based upon the circumstances of this case the Public Guardian had the right to substitute his judgment for that of Virginia Prange and refuse medical treatment. The court pointed out that Virginia Prange's judgment to refuse artificial means of nutrition and hydration to prolong her persistent vegetative state was evidenced by her written statement and her oral statements to her friends and was unrebutted.

The Court held that the right to refuse medical treatment "–is grounded in both the Common Law right to be free from non-consentual bodily invasions and the unwritten and penumbral Right to Privacy protected by the United States Constitution." The Court went on to point out that this right is specifically found in the Illinois Constitution as well. (Appendix B, Page 11).

The Illinois Appellate Court opinion was entered on February 11, 1988, and the Petition for Rehearing was

denied on March 24, 1988. The Guardian ad Litem moved to be relieved of her responsibilities in the Illinois Supreme Court and to have Americans United for Life substituted. The Americans United for Life (AUL) was the amicus curiae at the Appellate Court level and asked the Illinois Supreme Court for permission to act as the GAL for purposes of filing a Petition for Leave to Appeal in that Court. The Illinois Supreme Court denied the motion of the AUL to dismiss Margaret Benson, and to act as a GAL, denied the Petition for Leave to Appeal, and vacated the Order and Opinion of the Illinois Appellate Court in an unsigned Order (Appendix A). A Petition for rehearing was filed in a timely manner and was treated as a Motion for Reconsideration and denied on June 10, 1988 (Appendix D).

ARGUMENT

THE FINAL ORDER OF THE ILLINOIS SUPREME COURT MERITS REVIEW BECAUSE, BY IMPLICATION, THE ORDER DEPRIVES ILLINOIS CITIZENS OF PRIVACY RIGHTS, RECOGNIZED AND ENFORCEABLE IN OTHER JURISDICTIONS, TO HAVE LIFE SUPPORT SYSTEMS TERMINATED WHEN ONE IS IN A PERSISTENT VEGETATIVE STATE.

On May 19, 1988, the Illinois Supreme Court vacated, without allowing briefing or a hearing, the opinion of the Illinois Appellate Court that a guardian, on behalf of his ward, could reject life sustaining medical treatment for that ward in accordance with the ward's previously expressed wishes. The action of the Illinois Supreme Court seriously calls into question the existence and enforceability of a right of privacy as well as the widely

recognized common law right of self-determination of a disabled person in Illinois to continue to direct the course of their medical care.

The Illinois Legislature has recognized the right to reject life-prolonging medical treatment for individuals who have the foresight, intelligence, and/or resources to draw up Living Wills or have durable Powers of Attorneys. *Ill. Rev. Stat.* Chap. 110 ½, Sec. 701-10 (1987) and *Ill. Rev. Stat.* Chap. 110 ½, Sec. 804-1 (Effective 9-22-87). Virginia Prange did not rely on either of these statutes in executing her memorandum regarding the direction of her treatment. However, both of these statutes expressly state that they do not impair or supersede currently existing laws. Thus they are not the exclusive method for exercising Constitutional Rights.

The Decision of the Illinois Supreme Court in Vacating the Illinois Appellate Court's Opinion, without direction or comment, places a whole group of residents who may have addressed the issue of what should happen to them when they become comatose or are placed in a nursing home, but who are without a valid living will or durable power of attorney, into a limbo where relatives, physicians, guardians and courts must stand by helpless as they suffer a life maintained only by treatment and medical intervention contrary to their expressed desires.

Other states facing similar problems have given their citizens rights to terminate life support systems, which include nutrition, based upon both federal and state

Rights to Privacy. *Rasmussen v. Fleming*, 154 Ariz. 200, 203, 741 P.2d 674, 681 (Ariz. 1987); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195, 209 Cal Rptr. 220, 221, 225 (Cal. Ct. App. 2d 1984); *Foody v. Manchester Memorial Hospital*, 40 Conn. Supp. 127, 482 A.2d 713, 717 (Super Ct. 1984); *In re Severns*, 425 A.2d 156, 158, 159 (Del. Ch. 1980); *Satz v. Perlmutter*, 362 So. 2d 160, 162 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980); *In re L.H.R.*, 253 Ga. 439, 446, 321 S.E.2d 716, 722 (1984); *Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 430-33, 497 N.E.2d 626, 632-33 (1986); *In re Torres*, 357 N.W.2d 332, 339 (Minn. 1984); *In re Quinlan*, 70 N.J. 10, 40, 355 A.2d 647, 662-63, *cert. denied*, 429 U.S. 922 (1976) *overruled in part on other grounds: In re Conroy*, 98 N.J. 321, 348, 486 A.2d 1209, 1222-23 (1985); *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 9, 426 N.E. 2d 809, 813-14 (Com. Pl. 1980); *In re Colyer*, 99 Wash. 2d 114, 120, 660 P.2d 738, 742 (1983), *overruled in part on other grounds*. In addition, unlike Illinois, other jurisdictions specifically asserted that this right persists beyond incapacity so that the right can be asserted by a guardian or family member. *In Re Quinlan*, 70 N.J. 10, 355 A.2d 447 (N.J. Supr. Ct. 1976); *In the Matter of Spring*, 380 Mass. 629, 405 N.E. 2d 115 (Mass. Supr. Ct. 1980); *In the Matter of Conroy*, 98 N.J. 321, 348, 486 A.2d 1209 (1985); *In Re L.H.R.*, 253 Ga. 439, 321 S.E. 2d 716 (1984); *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E. 2d 417 (1977); *In Re Severns*, 425 A.2d 156 (Del. Ch. 1980).

The present case gives this Court the unique opportunity of clarifying the Constitutional Right to Privacy

and the extent of that right insofar as a surrogate's ability to substitute its judgment for that of a comatose patient.

Respectfully submitted,

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APPENDIX A

SEAL

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

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CLERK OF THE COURT
(217) 782-2035

FIRST DISTRICT OFFICE
ROOM 30-129
RICHARD J. DALEY CENTER
CHICAGO 60602
(312) 793-1332

May 19, 1988

Ms. Margaret C. Benson
Chicago Volunteer Legal
Services Foundation
205 W. Randolph St., S#510
Chicago, IL 60606

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 66947 – In re Estate of Virginia T. Prange: Patrick T. Murphy, etc. respondent, v. Chicago Volunteer Legal Services Foundation (Americans United for Life Legal Defense Fund, petitioner).

The petition for leave to appeal in this cause is dismissed, and the judgment of the Appellate Court, First District, case No. 86-3398, from which the petition was taken is vacated. Mandate to issue forthwith.

The motion by the Chicago Volunteer Legal Services Foundation for leave to withdraw as counsel on appeal and for appointment of Americans United for Life Legal Defense

Fund, or, in the alternative, as guardian ad litem is *denied*. The motion by the Americans United for Life Legal Defense Fund to be appointed as counsel on appeal, or, in the alternative, as guardian ad litem is *denied*.

JH:as

cc: Mr. Patrick T. Murphy
Mr. Robert A. Weisman
Mr. Clarke D. Forsythe
Mr. Dennis J. Horan
Mr. Victor G. Rosenblum

APPENDIX B

FOURTH DIVISION
February 11, 1988

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

86-3398

	)	Appeal from
	)	the Circuit Court
	)	of Cook County.
In re ESTATE OF	)	
VIRGINIA T. PRANGE.	)	
	)	Honorable
	)	Miriam E. Harrison,
	)	Judge Presiding.

PRESIDING JUSTICE JIGANTI delivered the opinion of the court:

Patrick T. Murphy, the public guardian of Cook County, initiated this action by petitioning the trial court for an order directing the discontinuance of artificial means of providing nutrition and hydration to the guardian's ward, Virginia T. Prange, who was in a persistent vegetative state from which she was not expected to recover. The petition indicated that when Virginia Prange was competent, she stated both in writing and in conversations with her friends that she did not wish to be kept alive by artificial means if there was no hope of recovery. The court appointed a guardian *ad litem* to represent the opposing position and a hearing was held. Following the hearing, but before a decision was rendered, Virginia Prange died. The court dismissed the matter as moot and the public guardian has appealed. The issue before us is whether artificial means of providing nutrition and

hydration could properly be withdrawn from a patient in a persistent vegetative state who, prior to her incompetency, had clearly expressed the desire not to be maintained in that condition.

On motion of the public guardian, this court appointed Margaret C. Benson of the Chicago Volunteer Legal Services Foundation to file an appellee's brief representing the opposing position on appeal. We also permitted the participation as *amici curiae* of the Society for the Right To Die, Inc., the Americans United for Life Legal Defense Fund, the Catholic League for Religious and Civil Rights and the Ethics and Advocacy Task Force of the Nursing Home Action Group.

Virginia Prange was a 74-year-old woman who had undergone seven surgeries over the past several years to remove a persistent brain tumor. She had no close relatives and resided in a nursing home after her last surgery in December 1985. In January 1986, Prange lapsed into what her attending physician characterized as a persistent vegetative state. She was unable to interact with her environment and did not respond purposefully to stimuli. A nasogastric tube was inserted in order to provide her with nutrition and hydration.

The public guardian was appointed as a plenary guardian of Virginia Prange, and on October 30, 1986, he filed a petition regarding medical consent. In the petition, the public guardian stated that he had refused consent for a surgical procedure and blood transfusions and asked the court to ratify those decisions. The petition further requested that the court direct the public guadian to remove the nasogastric tube, thereby discontinuing

artificial means of providing nutrition and hydration to Virginia Prange. Attached to a memorandum accompanying the petition was the following statement signed by Virginia Prange:

> "To My Family, My Physician, My Lawyer, and All Others Whom It May Concern:
>
> Death is as much a reality as birth, growth, maturity and old age – it is the one certainty of life. If the time comes when I can no longer take part in decisions for my own future, let this statement stand as an expression of my wishes and directions, while I am still of sound mind.
>
> If at such a time the situation should arise in which there is no reasonable expectation of my recovery from extreme physical or mental disability, I direct that I be allowed to die and not be kept alive by medications, artificial means, or 'heroic measures.' I do, however, ask that medication be mercifully administered to me to alleviate suffering, even though this may shorten my remaining life.
>
> This statement is made after careful consideration and is in accordance with my strong convictions and beliefs. I want the wishes and directions here expressed carried out to the extent permitted by law. Insofar as they are not legally enforceable, I hope that those to whom this Will is addressed will regard themselves as morally bound by these provisions."

This statement was apparently drafted according to the specifications of the Illinois Living Will Act (Ill. Rev. Stat. 1985, ch. 110 1/2, par. 701 *et seq.*, recently amended by 85th Ill. Gen. Assem., Senate Bill 1147, 1987 Sess., effective January 1, 1988) which provides a mechanism for persons, while competent, to make decisions relating to their medical care in the event of a terminal illness. Virginia

Prange's statement was not a valid "living will," however, because it lacked the requisite number of witnesses.

At a hearing on the petition, the public guardian introduced the testimony of five persons who were close friends of Virginia Prange. Monsignor Joseph Howard testified that in 1985, Prange told him that she wanted no further operations and that she would rather die than have her life prolonged by artificial or extraordinary means. Eleanor Jennings, who witnessed the above-quoted "living will" written by Prange, stated that Prange told her she did not want to be kept alive by "tube feeding" and would rather "close her eyes and die." Barbara Knuth, Prange's second cousin, testified that she had discussed the topic of death with Prange and that Prange told her that she did not want to live in a nursing home and that she wished to "die with dignity." Two other witnesses, Sister Mary Ann McSweeney and Terese Barlow, testified that based upon their conversations with Virginia Prange, it was their opinion that she would not wish to be kept alive by artificial means of providing nutrition and hydration. Objections to this opinion testimony were sustained by the trial judge.

All but one of the physicians who testified at the hearing conceded that Virginia Prange was in a persistent vegetative state and had suffered irreversible neurological damage. Dr. Joseph Carr, Prange's attending physician since December 1985, testified that Prange was unresponsive to stimuli for the past six months and would never regain consciousness. He further stated that her deteriorating state would only worsen and that it was unlikely that she would feel pain if the artificial means of nourishment were removed. Dr. Michael Preodor, the

medical director of a hospice affiliated with St. Joseph's Hospital, testified that he had examined Virginia Prange and had reviewed her medical records. It was his opinion that Prange had suffered permanent intellectual impairment and that even if her physical condition were to improve, she would not be able to be involved with her environment to any significant degree. Dr. Preodor stated that under these circumstances, he considered the continuation of tube feeding an extraordinary measure. He further stated that although there was no evidence that Prange could feel pain, there was no way this could be conclusively determined. Dr. Steven Miles, an associate director at the Center for Clinical Medical Ethics at the University of Chicago, testified that he had examined Virginia Prange and had reviewed her medical records covering the period from November 1985 until the present. He concluded that she suffered from an irreversible and progressive condition with a permanent reduction of her intellectual functions. Dr. Miles stated that Prange was terminally ill and that, in his opinion, she would not feel pain if nutrition and hydration were withdrawn. Dr. Quentin Young, a specialist in internal medicine, testified that Virginia Prange had sustained irreversible brain damage and would not recover from her neurological impairment.

The only physician who expressed disagreement with the above-stated opinions regarding Virginia Prange's prognosis was Dr. Leonard Kranzler, a neurosurgeon who had been called into consultation on Prange's case in December 1975. Dr. Kranzler testified that he had performed several successful brain surgeries on Virginia Prange. He had not seen Prange from the time

of the last surgery in December 1985 until October 1986. Dr. Kranzler stated that when he examined Prange in October 1986, she was suffering from several medical problems including septicemia and decubitus ulcers. He further stated that her persistent brain tumor had not increased very much since November 1985 and that if she were given proper nutrition, antibiotics and electrolytes, she had the potential to improve, although he could not say to what degree. Dr. Kranzler admitted that he had not reviewed the hospital or nursing home notes from the period covering December 1985 until October 1986. Therefore, he did not know whether the medical problems he observed had been corrected earlier with no effect upon her comatose condition.

There are two preliminary issues which must be addressed before we consider the issue regarding the removal of the artificial means of nutrition and hydration. These preliminary issues are whether the cause became moot upon the death of Virginia Prange and whether the public guardian had standing to bring the petition asking for removal of the nasogastric tube.

As previously stated, Virginia Prange died shortly before the trial court was to render its decision, and the cause was dismissed as moot. The public guardian has appealed the dismissal, arguing that the public-interest exception to the mootness doctrine is applicable to the instant cause. The public-interest exception recognizes the need for authoritative guidelines in situations "capable of repetition yet evading review." (*Roe v. Wade* (1973), 410 U.S. 113, 125, 35 L. Ed. 2d 147, 161, 93 S. Ct. 705, 713.) Several jurisdictions have applied the public-interest exception to consider cases involving the removal of life-

support systems from persons in a persistent vegetative state where the person has died during the pendency of the litigation. *Rasmussen v. Fleming* (Ariz. 1987), 741 P.2d 674, 680-81; *Bartling v. Superior Court* (1984), 163 Cal. App. 3d 186, 209 Cal. Rptr. 220; *Corbett v. D'Alessandro* (Fla. Dist. Ct. App. 1986), 487 So. 2d 368; *In re Conroy* (1985), 98 N.J. 321, 486 A.2d 1209; *In re Guardianship of Hamlin* (1984), 102 Wash. 2d 810, 689 P.2d 1372.

The appellee advances two arguments in support of the trial court's decision to dismiss the cause as moot. First, he notes that unlike many of the cases cited above, Virginia Prange died prior to the trial court's decision, resulting in no findings of fact upon several crucial issues. The appellee maintains that if we reverse the determination of mootness, we must remand the cause to the trial court for the entry of such findings of fact. We disagree. The record before us is complete and the evidence concerning the crucial issues of Virginia Prange's medical condition and her wishes regarding artificial means of life support is clear. The testimony of Virginia Prange's friends, coupled with the attempted "living will," showed conclusively that she did not wish to be kept alive by artificial means if there was no hope of recovery. Also, the testimony of the medical experts who testified at trial established clearly and convincingly that Prange would not have recovered from her vegetative and comatose condition. Only one physician, Dr. Leonard Kranzler, testified that if all of Prange's physical problems were corrected, it was possible that she could improve although he did not know what degree of improvement could be achieved. On cross-examination, it became clear that Dr. Kranzler had not reviewed certain

pertinent medical information relating to Prange's condition following her last brain surgery. All of the doctors who were familiar with that information, including her attending physician, agreed that Prange had no chance of recovering from her persistent vegetative state. Under these circumstances, we believe that it is unnecessary to remand the cause to the trial court for findings of fact.

The appellee then argues that the public-interest exception to the mootness doctrine is inapplicable because the legislature has set authoritative guidelines governing situations such as this in the Living Will Act. (Ill. Rev. Stat. 1985, ch. 110 1/2, par. 701 *et seq.*, recently amended by 85th Ill. Gen. Assem., Senate Bill 1147, 1987 Sess., effective January 1, 1988.) The Living Will Act provides a means by which a person, while competent, can make decisions in advance regarding what kind of medical treatment will be given to him at such time when he is incompetent to make those decisions. By its terms, the Living Will Act covers situations in which a person has executed a valid "living will" and allows the withdrawal of medical treatment only where the person is terminally ill. However, the document executed by Virginia Prange was not a valid "living will" because it lacked the requisite numbr of witnesses. Also, while the evidence at trial established that Prange was in a persistent vegetative state from which she would not recover, it did not establish that she would die within a short time, which is the definition of "terminally ill" set out in the Act. For these reasons, the Living Will Act is not applicable to the instant cause. Moreover, and of particular importance, the Living Will Act by its very terms establishes that it was not intended to cover all situations

regarding the refusal of medical treatment. The Act specifically states that "nothing in this Act shall impair or supersede any legal right or legal responsibility which any person may have to effect the withholding or withdrawal of death delaying procedures in any lawful manner. In such respect, the provisions of this Act are cumulative." (Ill. Rev. Stat. 1985, ch. 110 1/2, par. 709(d), as amended by 85th Ill. Gen. Assem., Senate Bill 1147, 1987 Sess., effective January 1, 1988.) We therefore agree with the public guardian that there is a need for authoritative guidelines in this area and accordingly decline to dismiss the cause as moot.

We next consider the appellee's argument that the public guardian lacked standing to institute the instant legal proceeding on behalf of Virginia Prange. As support for this argument, the appellee cites *In re Marriage of Drews* (1986), 115 Ill. 2d 201, 503 N.E.2d 339, *cert. denied*, 97 L. Ed. 2d 729. In *Drews*, the Illinois Supreme Court held that the provisions of the Probate Act which govern the relationship between a guardian and a ward do not confer upon a guardian standing to maintain an action for dissolution of the ward's marriage. The appellee argues that the *Drews* rationale would similarly preclude a guardian from filing a legal proceeding to enforce the ward's right to refuse medical treatment. We do not believe that *Drews* should be extended to cover the instant situation. In reaching its holding that a guardian lacked standing to maintain an action on behalf of a ward for the dissolution of the ward's marriage, the *Drews* court relied upon two factors: a strong majority rule in other jurisdictions and early Illinois precedent in accord

with that majority rule. With respect to the instant situation, the appellee has pointed to no precedent from Illinois or other jurisdictions which supports the proposition that a personal or plenary guardian may not maintain a legal proceeding, on behalf of an incompetent ward, to enforce the ward's right to refuse medical treatment. In fact, several jurisdictions allow such actions by a personal guardian. (See *Rasmussen v. Fleming* (Ariz. 1987), 741 P.2d 674; *In re Conroy* (1985), 98 N.J. 321, 486 A.2d 1209; *Delio v. Westchester County Medical Center* (N.Y. App. Div. 1987), 516 N.Y.S.2d 677; *Brophy v. New England Sinai Hospital, Inc.* (1986), 398 Mass. 417, 497 N.E.2d 626; *In re Guardianship of Hamlin* (1984), 102 Wash. 2d 810, 689 P.2d 1372.) These jurisdictions have interpreted their guardianship statutes to allow the guardian to refuse consent for medical procedures as well as to consent to those procedures. Furthermore, there is precedent in Illinois for legal proceedings such as the instant one to be brought by a plenary or personal guardian. (See *In re Estate of D.W.* (1985), 134 Ill. App. 3d 788, 481 N.E.2d 355.) In *In re Estate of D.W.*, the personal guardian of an incompetent ward petitioned the court for permission to consent to an abortion for her mentally retarded ward. The trial court denied the petition and this court reversed, holding that "the Probate Act * * * vests a guardian with broad authority to act in the best interest of the ward." (134 Ill. App. 3d at 791, 481 N.E.2d at 356-57.) We therefore do not believe that the *Drews* holding should be extended to prohibit the public guardian from bringing the instant petition regarding medical consent on behalf of Virginia Prange.

The preliminary questions of mootness and standing having been resolved, we turn now to the question of whether the substituted judgment of Virginia Prange, as evidenced by her written statement and oral statements to friends, to refuse artificial means of nutrition and hydration to prolong her persistent vegetative state should be honored.

The right to refuse medical treatment is grounded in both the common-law right to be free from nonconsensual bodily invasions and the unwritten and penumbral right to privacy protected by the United States Constitution. (*Brophy v. New England Sinai Hospital, Inc.* (1986), 398 Mass. 417, 497 N.E.2d 626.) Moreover, unlike the Federal Constitution, the Illinois Constitution expressly provides for a right to privacy. (Ill. Const. 1970, art. I, §6.) Although this provision is invoked most often in a fourth-amendment context, it has been held that its protection should be broadly applied (see *People v. Jackson* (1983), 116 Ill. App. 3d 430, 452 N.E.2d 85), and we believe it may be properly interpreted as encompassing a person's right to refuse medical treatment.

It has been held that the right to refuse medical treatment extends to incompetent, as well as competent, individuals. (*Brophy v. New England Sinai Hospital, Inc.* (1986), 398 Mass. 417, 497 N.E.2d 626.) Many states have enacted statutes similar to the Illinois Living Will Act which provide a method for an individual, while competent, to prepare a written declaration directing the withholding of life sustaining or, as termed in the Illinois Act, "death-delaying" medical procedures in the event of a terminal condition. (See *In re Farrell* (1987), 108 N.J. 335, 529 A.2d 404, 407 n.2, for a list of legislative enactments

in 38 states providing for such "living wills.") Where a person has failed to make a valid written declaration expressing his intent with respect to life-sustaining medical procedures in the event of a terminal illness, the doctrine of substituted judgment is often employed to effectuate, as far as possible, the wishes of the patient. Under the doctrine of substituted judgment, the question is not what a reasonable or average person would have chosen to do under the circumstances, but rather what the particular patient would have done if able to choose for himself. (*In re Conroy* (1985), 98 N.J. 321, 486 A.2d 1209.) The best evidence of what the patient would choose, of course, is a previous expression of intent with regard to the matter.[1] Applying this standard to the case at bar, it appears that Virginia Prange, prior to becoming incompetent, made clear her desire to decline life-sustaining procedures in the absence of any hope for her recovery. Exercise of the substituted judgment doctrine, then, allows the public guardian to take the appropriate steps to see that her expressions of intent with respect to such medical treatment are given effect.

We are aware that no Illinois case has previously addressed the question of whether artificial-feeding devices, such as the nasogastric tube in the instant cause, are included among the life-sustaining procedures which a patient may decline. However, the jurisdictions which

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[1] We recognize that application of the substituted judgment doctrine becomes much more difficult in situations in which the patient has never been competent or has not made any statements from which his intent on the matter of medical treatment in the event of a terminal illness could be discerned. See *In re Grant* (1987), 109 Wash. 2d 545, ___ P.2d ___.

have considered the issue have uniformly held that a patient's constitutional right to privacy includes the right to have such artificial-feeding devices removed. (*Rasmussen v. Fleming* (Ariz. 1987), 741 P.2d 674; *Corbett v. D'Alessandro* (Fla. Dist. Ct. App. 1986), 487 So. 2d 368; *Brophy v. New England Sinai Hospital, Inc.* (1986), 398 Mass. 417, 497 N.E.2d 626; *In re Conroy* (1985), 98 N.J. 321, 486 A.2d 1209; *Delio v. Westchester County Medical Center* (N.Y. App. Div. 1987), 516 N.Y.S.2d 677.) As stated in *Corbett v. D'Allessandro*:

> "We are unable to distinguish on a legal, scientific, or a moral basis between those artificial measures that sustain life – whether by means of 'forced' sustenance of 'forced' continuance of vital functions – of the vegetative, comatose patient who would soon expire without the use of those artificial means. * * * [W]e see no reason to differentiate between the multitude of artificial devices that may be available to prolong the moment of death." (*Corbett v. D'Allessandro* (Fla. Dist. Ct. App. 1986), 487 So. 2d 368, 371.)

We are in agreement with the jurisdictions which have considered the termination of artificial-feeding devices that the use of those devices to prolong the life of a person in an irreversibly comatose or vegetative state constitutes the type of extraordinary care that a patient has a constitutional right to decline.

We recognize that the constitutional and common-law right to refuse medical treatment is not without limits. Courts have identified the following four State interests which may serve to limit the right to refuse treatment: (1) the preservation of life; (2) the prevention of suicide; (3) the protection of innocent third parties; and

(4) safeguarding the integrity of the medical profession. *Rasmussen v. Fleming* (Ariz. 1987), 741 P.2d 674.

The first of these State interests – the preservation of life – is generally considered the most important. (*In re Conroy* (1985), 98 N.J. 321, 486 A.2d 1209.) It has been recognized, however, that the State's interest in preserving life weakens and must yield to the patient's interest where the medical treatment in question "serves only to prolong a life inflicted with an incurable condition." (*Rasmussen v. Fleming* (Ariz. 1987), 741 P.2d 674, 683, citing *In re Colyer* (1983), 99 Wash. 2d 114, 122, 660 P.2d 738, 743.) The evidence in the case at bar clearly and convincingly establishes that Virginia Prange was in a persistent vegetative state from which she would not recover. Based on this evidence, we cannot conclude that the State's interest in preserving life outweighed Prange's right to discontinue artificial means of providing nutrition and hydration.

With respect to the second State interest, we do not believe that asserting the right to refuse medical treatment in the circumstances before us is tantamount to suicide. "A death which occurs after the removal of life-sustaining systems is from natural causes, neither set in motion nor intended by patient." (*In re Colyer* (1983), 99 Wash. 2d 114, 123, 660 P.2d 738, 743.) "Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of a self-inflicted injury." (*In re Conroy* (1985), 98 N.J. 321, 351, 486 A.2d 1209, 1224.) We therefore conclude

that the State interest in preventing suicide is not contravened by the removal of the nasogastric tube in this cause.

The State interest in protecting third parties is not a matter of concern in the case at bar because Virginia Prange did not have any dependent children or close relatives who would have been affected by honoring her desire to discontinue artificial means of nourishment.

The final State interest which must be considered is the interest in safeguarding the integrity of the medical profession. The medical profession itself recognizes that it is not ethically bound to provide or continue medical treatment in all situations regardless of the circumstances and desires of the patient. The American Medical Association, through its Council on Ethical and Judicial Affairs, issued the following statement dated March 15, 1986:

> "Withholding Or Withdrawing Life Prolonging Medical Treatment.
>
> The social commitment of the physician is to sustain life and relieve suffering. Where the performance of one duty conflicts with the other, the choice of the patient, or his family or legal representative if the patient is incompetent to act in his own behalf, should prevail. In the absense of the patient's choice or an authorized proxy, the physician must act in the best interests of the patient.
>
> For humane reasons, with informed consent, a physician may do what is medically necessary to alleviate severe pain, or cease or omit treatment to permit a terminally ill patient whose death is imminent to die. However, he should not intentionally cause death. In deciding whether the administration of potentially

> life-prolonging medical treatment is in the best interest of the patient who is incompetent to act in his own behalf, the physician should determine what the possibility is for extending life under humane and comfortable conditions and what are the prior expressed wishes of the patient and attitudes of the family or those who have responsibility for the custody of the patient.
>
> Even if death is not imminent but a patient's coma is beyond doubt irreversible and there are adequate safeguards to confirm the accuracy of the diagnosis and with the concurrence of those who have responsibility for the care of the patient, it is not unethical to discontinue all means of life-prolonging medical treatment.
>
> *Life-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition or hydration.* In treating the terminally ill or irreversibly comatose patient, the physician should determine whether the benefits of the treatment outweigh its burdens. At all times, the dignity of the patient should be maintained." (Emphasis added.)

(See also *Rasmussen v. Fleming* (Ariz. 1987), 741 P.2d 674, 684-85; *Bartling v. Superior Court* (1984), 163 Cal. App. 3d 186, 196, 209 Cal. Rptr. 220, 225.) The above-quoted statement by the American Medical Association leads us to conclude that discontinuance of artificial means of nutrition and hydration in the instant cause would not have an adverse impact upon the integrity of the medical profession.

For the reasons stated herein, we believe that the public guardian, using the doctrine of substituted judgment, could consent to the removal of artificial means of providing nutrition and hydration to a patient in a persistent vegetative state from which there was no hope of

recovery. In reaching this conclusion, we not that although the Illinois legislature has enacted a Living Will Act, that Act does not cover situations, such as the one before us, where the patient does not have a valid living will or is not "terminally ill" as defined by the Act. Although the decision which we render here will undoubtedly be used as a guideline for future similar cases, it is necessarily circumscribed by the facts presented and cannot cover every situation which might arise. As stated in *Rasmussen v. Fleming* (Ariz. 1987), 741 P.2d 674, 692, "[o]nly the Legislature has the resources necessary to gather and synthesize the vast quatities of information needed to formulate guidelines that will best accomodate the rights and interests of the many individuals and institutions involved in these tragic situations." We therefore urge the Illinois legislature to respond to these matters within permissible constitutional limits.

Accordingly, the judgment of the trial court is reversed.

Reversed.

JOHNSON and LINN, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

Estate of	)	No. 86-P-3620
Virginia Prange	)	Doc. 203
A Disabled Person	)	Page 630

ORDER

This matter coming to be heard on the petition regarding medical consent, Patrick T. Murphy and Rebecca Kolling in behalf of the Public Guardian, Robert Weisman, Guardian ad litem; Gaile Galente appearing for St. Joseph's Hospital all being present in Court; the Court having been advised that Virginia Prange died on November 10, 1986, the Court having found that the issue was rendered moot by the death of Virginia Prange and that any decision rendered would be merely advisory;

IT IS HEREBY ORDERED that the petition regarding medical consent is dismissed and the guardian ad litem is discharged from further duties.

Atty No. 70500
Rebecca K. Kolleng
Attorney for Patrick T. Murphy
306 Daley Center
Chicago, Illinois 60602
Telephone 443-6554

CIRCUIT COURT
PROBATE DIV.
ENTERED

NOV. 12, 1986

JUDGE MIRIAM E.
HARRISON

MORGAN F. FINLEY,
CLERK OF THE CIRCUIT COURT OF COOK COUNTY

APPENDIX D

SEAL

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

FIRST DISTRICT OFFICE
ROOM 30-129
RICHARD J. DALEY CENTER
CHICAGO 60602
(312) 793-1332

June 10, 1988

Mr. Patrick T. Murphy
Office of the Public Guardian
of Cook County
221 N. LaSalle, S#1555
Chicago, IL 60601

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 66947 – In re Estate of Virginia T. Prange: Patrick T. Murphy, etc., respondent, v. Chicago Volunteer Legal Services Foundation (Americans United for Life Legal Defense Fund, petitioner).

Motion by respondent for reconsideration of this Court's order entered May 19, 1988, dismissing the petition for leave to appeal and vacating the judgment of the Appellate Court, First District, in case No. 83-3398. Motion *denied*.

JH/hc
cc: Mr. Clarke D. Forsythe
Ms. Margaret Benson
Clerk of the Appellate Court, First District